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No. 06-1625

IN THE

Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW,* STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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PETITIONERS' REPLY BRIEF

Petitioners file this reply in support of their petition.

ARGUMENT

In their brief in opposition ("Fed. Opp'n"), the federal respondents (collectively, hereinafter "Government") claim the panel decision does not conflict with decisions of this Court or any other appellate court, Fed. Opp'n, at 8, then briefly argue that this Court should let the panel decision stand under principles of *res judicata* based on the prior National Wrestling Coaches Association ("NWCA") litigation (*id.* at 8-10), lack of standing (*id.* at 10-13), and 5 U.S.C. §704's limit on the waiver of sovereign immunity in the Administrative Procedure Act ("APA") (*id.* at 13-15). Petitioners reiterate several of the more significant conflicts with the decisions of this Court and other courts of appeal that the Government ignores (Section I) and rebut the few affirmative arguments that the Government makes (Section II).

I. PANEL DECISION CONTRADICTS DECISIONS OF THIS COURT AND OTHER CIRCUITS

To claim that the panel decision "does not conflict with any decision of the this Court or any other court of appeals" Fed. Opp'n, at 8, the Government ignores several such conflicts raised in the petition and reiterated here.

A. Three-Judge Panels Must Follow Precedent. Under controlling D.C. Circuit precedent, the non-*NWCA* plaintiffs affiliated with public schools have both standing and judicial review. *Comm. for Full Employment v. Blumenthal,* 606 F.2d 1062, 1066 & n.18 (D.C. Cir. 1979) (Fourteenth Amendment's independent prohibition against government discrimination precludes state entities' refusing federal funds to continue discrimination); *Adams v. Bell,* 711 F.2d 161, 167-68 & nn.35, 36 (D.C. Cir. 1983) (*en banc*) ("judicial review will be available only after a Federal 'department or agency action,' [which] include[s] the 'conscious[] and express[] adopt[ion] of a general policy' of nonenforce-

ment") (citations omitted); *accord* 711 F.2d at 182 & n.58 (Wright, J., dissenting); *see also* Section I.G, *infra* (judicial review against federal officers' *ultra vires* actions). Significantly for standing and judicial review, the *NWCA* pleadings addressed only discrimination by *private* schools and sought relief against only sovereign federal entities.

In refusing to follow controlling precedents on standing and judicial review, which *NWCA* did not and could not overrule, the panel below violated the law of every circuit by purporting to overrule settled law without the authority to do so. Pet. at 10-11. Following *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999), and *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998), this Court should reject the panel's "extreme" application of preclusion to nonparties and its ignoring of binding authority.

B. Scope of "Curable-Defect" Exception. The Government ignores the circuit split on the "curable-defect" exception to preclusion, Pet. at 14-15, acknowledging Petitioners' curable-defect argument only in passing, to parrot that the pleadings are fatally and incurably deficient under *NWCA*. Fed. Opp'n, at 9-10. In doing so, the Government ignores the fact that the panel below found both standing and judicial review to challenge the Three-Part Test, albeit only for post-*NWCA* claims that *NWCA* could not have addressed. App. 3a. Insofar as the pleadings establish both standing and judicial review, the *NWCA* defects obviously are both curable and cured.

C. *Res Judicata* for New Causes of Action. Apparently acknowledging that *res judicata* does not apply to new causes of action, Fed. Opp'n, at 10 n.3, the Government ignores the dual circuit splits on both the applicability of that doctrine to continuing violations and its timing (*e.g.*, to

actions that arise after filing the prior complaint versus those that arise after entry of the prior judgment). Pet. at 16-17. If the petition-denial plaintiff that has thrown in the proverbial towel had standing and judicial review over the 2003 denial of its petition to repeal the Three-Part Test, the remaining plaintiffs have standing and judicial review over the 2003 decision to maintain the Three-Part Test. Pet. at 16 (*citing I.C.C. v. Bhd. of Locomotive Eng'rs,* 482 U.S. 270, 278 (1987)). As a new cause of action, *res judicata* does not apply, both as a matter of law, Pet. at 17, and because *NWCA* did not purport to preclude "review of [the *NWCA* plaintiffs'] claims on the merits, when raised in a judicially reviewable case or controversy." *NWCA,* 366 F.3d at 947.

D. Indirect "Unequal Footing" Injuries. In *Clinton v. New York,* nine justices of this Court agreed that the "unequal footing" form of injury applies to "third-party" or indirect equal-protection injuries. 524 U.S. 417, 433 & n.22 (1998); 524 U.S. at 456-57 (Scalia, J., dissenting). The *NWCA* panel relied on the indirect nature of injury to deny standing based on restoring an equal competitive footing, as distinct from standing based on restoring cut teams. *NWCA,* 366 F.3d at 944 ("These 'unequal footing' cases are inapposite here. In both *Gratz* and *Adarand,* the challenged policies *directly* injured the plaintiffs, without any intervening, third-party decision maker.") (emphasis in original). Absent *Clinton* (which the *NWCA* parties did not brief), the D.C. Circuit's decision would present a clear split with *Bras v. Cal. Pub. Util. Comm'n,* 59 F.3d 869, 873 (9th Cir. 1995), on an issue central to federal jurisdiction over government dictates to lower levels of government, employers, and schools. Given *Clinton,* however, the panel's refusal to find unequal-footing standing, at least for the non-*NWCA* parties, presents

a clear instance of a lower court's forgetting its place.

E. Authorization of Illegal Conduct. The Government ignores Petitioners' argument for standing based on the authorization of otherwise-illegal conduct. Pet. at 14, 20-21. Significantly, although it considered Title IX to provide an adequate enforcement remedy for *violations* of Title IX and its regulations at the "heart of appellants' claim," *NWCA*, 383 F.3d at 1048, *NWCA* denied standing on this theory because Title IX or its regulations *may* allow *some* gender-conscious cutting and capping, and the *NWCA* pleadings challenged only the Three-Part Test. 366 F.3d at 940-41. The pleadings here cure that oversight by challenging both, to the extent that they authorize gender-conscious cutting and capping "remedies" by schools not first adjudged to have violated Title IX. Pet. at 14, 20-21; Petitioners' Suppl. Br., at 9-10 (noting circuit splits on whether remedial gender discrimination requires history of discrimination by the entity). Even under *NWCA*, the pleadings establish standing.

F. Systemic Review. The Government ignores important decisions of this Court that §704 does not bar judicial review of federal standards, even when statutes confine individual review to other forums. Pet. at 29 (*citing Int'l Union v. Brock*, 477 U.S. 274, 285 (1986) *and Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990)). Reviewing Title IX's regulatory standards is particularly critical because (unlike in *NWCA*), Petitioners wish to challenge schools' athletic decisions via administrative complaints, which now are futile because the Government does not follow its regulations. App. 75a (¶28); Pet. at 23. Significantly, this injury is a first-party injury, which obviates *NWCA*'s heightened showing of causation and redressability. Pet. at 19.

G. Officer Suits. By characterizing this and *NWCA* as

both involving suits against the "Secretary" and "Assistant Secretary," Fed. Opp'n, at 4, 6, the Government fails to recognize that Petitioners here successfully invoked the venerable officer-suit exception to sovereign immunity by naming and serving the individual officers in their official and individual capacities. Pet. at 26-27. By contrast, *NWCA* addressed a proffered but not filed second amended complaint that named only federal offices, which *NWCA* in *dicta* would have rejected solely on sovereign immunity. *NWCA,* 366 F.3d at 947. Of course, naming "the officer..., both in [her] official capacity and acting under color of legal authority,... [invokes] those cases where the action is nominally brought against the officer in [her] individual capacity even though [she] was acting within the apparent scope of [her] authority and not as a private citizen. *Such actions are also in essence against the United States but are brought against the officer... as an individual only to circumvent what remains of the doctrine of sovereign immunity.*" *Stafford v. Briggs,* 444 U.S. 527, 539 (1980) (*quoting* H.R. Rep. No. 1936, 86th Cong., 2d Sess., 3-4 (1960)) (Court's emphasis); *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1328-29 (D.C. Cir. 1996) ("Nothing in the subsequent enactment of the APA.... repeal[s] the review of *ultra vires* actions;" "there is no sovereign immunity to waive – it never attached").

> [T]hat the King's courts in the name of the King could order his officers to account for their conduct [] was the essence of the doctrine of "the rule of law." Whatever the logical contradictions between this doctrine and sovereign immunity, the doctrine had become firmly established [and] as much a part of the law as the doctrine of sovereign immunity.

Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 432 (1958). Because *NWCA* did not present a

properly invoked officer suit, the Government officers cannot rely on it to evade review. Moreover, if the Government correctly argues that APA review is unavailable, naming and serving the officers qualifies as a post-*NWCA* event that cures the pleading defect, even under the panel's view of the law. *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983); *cf. Costello v. U.S.*, 365 U.S. 265, 285-86 (1961).

II. RESPONDENTS' REASONS FOR DENYING REVIEW ARE UNTENABLE

To the extent that Section I does not already do so, Petitioners refute the Government's affirmative arguments against this Court's granting the writ of *certiorari*.

A. Preclusive Effect of *NWCA*. The Government attempts to rebut Petitioners' arguments against *NWCA*'s preclusive effect. Fed. Opp'n, at 9 n.2. First, the Government misunderstands the *NWCA*-cited government report, which misleadingly suggests that aggregate men's teams increased under the Three-Part Test and inconclusively cites "gender-equity concerns" as a primary reason for schools to cut men's teams. *NWCA*, 366 F.3d at 943 ("report does not define [whether] 'gender equity concerns' ... are self-imposed or legally required"); Pet. at 18 & n.10. The report clearly misled the *NWCA* panel to believe aggregate men's teams had increased, *NWCA*, 366 F.3d at 942, when they clearly decreased. Pet. at 18 & n.10. As relevant here, that undermines *NWCA*'s analysis of standing, which concerns the interrelationship between injury, causation, and redressability. The *NWCA*-cited "inconclusiveness" concerned schools' *reasons for cutting* men's teams, not the *fact of cutting* men's teams, which *NWCA* (inaccurately) deemed "precise." *NWCA*, 366 F.3d at 942. Second, the Government suggests that *Jackson v. Birmingham Bd. of Educ.* merely held Title

IX to prohibit retaliation, without considering that the school retaliated against Coach Jackson because of *his students' gender*. Pet. at 18 & n.11. By expanding Title IX to include disparate treatment of coaches because of their students' gender, *Jackson* clearly expands coaches' rights and warrants reconsideration in light of new law, particularly since *NWCA* denied any opportunity for jurisdictional discovery. *Id.*

B. Title IX's Statutory Review. Ignoring the contrary appellate decisions cited by Petitioners, Pet. at 24, the Government cites five appellate decisions for the proposition that 20 U.S.C. §1683 does not make agency rules, regulations, and orders "reviewable by statute," outside the APA's adequate-remedy bar. Fed. Opp'n, at 13-14. As explained below, to the extent that they bear any relevance here, these five decisions argue against the Government's position, not for it.

1. *Washington Legal Found. v. Alexander,* 984 F.2d 483, 488 (D.C. Cir. 1993) ("*WLF*"), found DOE's Title VI nonenforcement unreviewable, but also found All Writs Act jurisdiction to consider DOE's unreasonable delay in finalizing a proposed agency rule or order under Title VI. Such All Writs Act review presupposes and protects courts' future jurisdiction over the final agency action by authorizing review of agency delay. *Telecomm. Research & Action Ctr. v. F.C.C.,* 750 F.2d 70, 74-75 (D.C. Cir. 1984). As such, *WLF* could not have *held* agency rules, regulations, and orders unreviewable. Indeed, by relying on the All Writs Act to preserve future jurisdiction over the eventual rule or order, *WLF* strongly suggests the exact opposite.

2. *Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 191-92 (4th Cir. 1999), declined review of the alleged racial impacts that would flow from the federal approval of a state transportation project. Although the federal

approval constitutes an "order," it may not constitute an "order of general applicability" under the language in 20 U.S.C. §1682 and 42 U.S.C. §2000d-1. While *Glendening* conflicts with the Sixth Circuit's more generous review under these statutes, *Selden Apartments v. H.U.D.*, 785 F.2d 152, 157-58 (6th Cir. 1986), it should not limit review of the Three-Part Test, which clearly serves as an "order of general applicability" and/or a "rule."

3. *N.Y. City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 14 (2nd Cir. 1995), involved a Securities & Exchange Commission no-action letter's changing that agency's interpretation of Rule 14a-8(c)(7) under the securities laws. As such, it did not involve statutory review under 20 U.S.C. §1683.

4. *Cousins v. Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 604-08 (1st Cir. 1989) (*en banc*), held that APA review applies to an anti-discrimination statute that arguably incorporates Title VI's review provisions. *Cousins* did not address which clause of §704 applies (*i.e.*, reviewable by statute versus final agency action without an adequate remedy). As a first-party agency denial that found APA review, without considering §704, *Cousins* adds nothing here: "Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cousins*, 880 F.2d at 608 (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)).

5. Finally, the Government quotes *NWCA* to dodge Petitioners' arguments and tackle a straw man: "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions other than the APA that govern judicial review of those actions." Fed. Opp'n, at 14 (*quoting NWCA*, 366 F.3d at 946-47). No one argues that *the APA*

makes Title IX rules, regulations, and orders reviewable by statute: *§903* makes them reviewable by statute. In any event, because the *NWCA* pleadings did not establish standing, "[a]ny statements... on the question of the judicial review bar would be unnecessary *dicta*." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005); Pet. at 12 ("*NWCA*'s judicial-review analysis is entirely gratuitous (*i.e., dicta*)"); Brief for the Respondent in Opp'n, at 11, *NWCA*, No. 04-922 (U.S.), 2005 WL 997132 ("[b]ecause petitioners lack standing..., [judicial review] is not properly presented here"). Having successfully argued here that *NWCA* did not "properly present" the judicial-review issue, the Government cannot now raise *NWCA* against judicial review.

Nothing in *Council of and for the Blind of Delaware County Valley, Inc., v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*) ("*CBDCV*"), and its progeny overturned an action under *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*), to review conscious, express policies under Title VI (or Title IX). Indeed, the D.C. Circuit sitting *en banc* in *Adams v. Bell* expressly and unanimously so held on the same day that it issued *CBDCV*. 711 F.2d at 167-68 & nn.35, 36; *accord* 711 F.2d at 182 & n.58 (Wright, J., dissenting). As here relevant, *Adams* differs from *CBDCV* in that the latter did not include a Title VI claim. *CBDCV*, 709 F.2d at 1525 n.15 ("district court's dismissal of the Title VI claim was not appealed"). As indicated in Section I.A, *supra*, a three-judge panel lacks the authority to overrule an *en banc* decision. As indicated previously, Title VI and Title IX unambiguously provide review of rules, regulations, and orders of general applicability. Pet. at 24-26.

C. §1983 Preemption within §704 Issue. Petitioners argue that the denial of constitutional review is particularly

acute if Title IX's implied private right of action against schools preempts an action under 42 U.S.C. §1983 to enforce the Equal Protection Clause. Pet. at 30 & n.19. The Government responds that (1) Petitioners cannot raise the argument here because they did not raise it below, and (2) in any event, the Third Circuit does not preempt the Juniata or Delaware plaintiffs' §1983 actions. Fed. Opp'n, at 13 n.5 (*citing Williams v. Sch. Dist.*, 998 F.2d 168, 175-76 (3rd Cir. 1993)). First, until the panel contradicted *NWCA* by finding *NWCA* to have settled the constitutional merits, *compare NWCA*, 366 F.3d at 947 (not reaching merits) *with* App. 3a (*NWCA* settled merits), the Juniata and Delaware plaintiffs had no reason to suspect that *NWCA* had settled constitutional issues not presented in *NWCA*. In any event, the petition plainly presents a question of the adequacy of alternate remedies. Fed. Opp'n, at I. With that issue presented below and here, Petitioners can raise any arguments here that support review on that issue. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim'") (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Second, far from "considering Title IX and federal constitutional claims against [the] school district," Fed. Opp'n, at 13 n.5, *Williams* very clearly upheld past Third Circuit precedent (cited by Petitioners) that "held that the constitutional claims are 'subsumed' in title IX" and that "district court[s]... properly [should] refuse[] to hear plaintiff's section 1983 claim." *Williams*, 998 F.2d at 176. The Government's argument to the contrary is baffling.

CONCLUSION

The writ of *certiorari* should be granted.

August 27, 2007

Respectfully submitted,

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